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No. 316

In the Supreme Court of the United States

OCTOBER TERM 1939

FRANK R. McNINCH, NORMAN S. CASE, T. A. M. CRAVEN, GEORGE HENRY PAYNE, FREDERICK I. THOMPSON, THAD H. BROWN AND PAUL A. WALKER, PETITIONERS

v.

PAUL R. HEITMEYER

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PRELIMINARY STATEMENT

On May 1, 1936 (R. 2), the Federal Communications Commission denied an application of the above-named respondent, Paul R. Heitmeyer, for authority to construct and operate a new local radio broadcast station at Cheyenne, Wyoming.

On December 27, 1937, the United States Court of Appeals for the District of Columbia, reversed and remanded that denial of the Federal Communications Commission. No plea for reconsideration of that judgment was ever made, although the rules of Court provide therefor.

Following that order (R. 30, 35, 36), the Commission proceeded to nullify and set aside the judgment of said United States Court of Appeals through the vehicle of a further hearing *and consolidation* thereof with a hearing *de novo* on two new applications. These two new applications had been filed while Heitmeyer's appeal was pending in the United States Court of Appeals for the District of Columbia. In other words, the Commission proceeded to take steps to make an entirely new record, with new parties and new issues. The Commission did this too, without the consent, knowledge or permission of the Appellate Court.

Thus, the Commission refused to proceed to make new findings of fact and a new decision on the record upon which Heitmeyer had appealed and upon which the Appellate Court had acted. If Heitmeyer had permitted the Commission to hold this new comparative and consolidated hearing on his own application and the other two new applications, both of which were filed after he had taken his appeal, he, himself would have made worthless all of his original record. He would thereby have nullified the winning of his own appeal to the United States Court of Appeals for the District of Columbia. To have permitted this hearing and to have participated in it would have forced him to make an entirely new

record. He would have been compelled to make a new showing of all facts necessary to be shown in a hearing on the application in comparison with these two new parties thereto, hitherto strangers to this case.

To prevent this prostitution of justice, and to compel the Commission to follow the age-old rule of all courts and cases, namely, the right to have a corrected decision on the record used on appeal, Heitmeyer took the procedural steps as outlined in the record. Those procedural steps resulted in a second decision and judgment (R. 52) by the United States Court of Appeals for the District of Columbia. This second opinion was of the same tenor as the first; except that it left no possible doubt of that Court's intent. The opinion was clear and positive as to the duty of the Commission to correct the wrong decision it had made on the record in the case, and to do this without any regard to new parties who might have filed applications long after the Heitmeyer record was closed and he had taken his appeal from the Commission's wrong decision.

The Commission has never made any effort to comply with the said judgments, nor has the Commission ever made any attempt to justify its refusal to comply with those judgments. Instead, it has delayed taking such action by every possible legal method. With each new delay, the Commission has insisted a new record should be made because of the lapse of time since the original record was made, although it has never applied to the Appellate Court for permission to reopen the case and take further testimony. This is especially significant when we recall that the Appellate Court pointed out

to the Commission the means of and grounds for reopening the record for further proceedings (R. 53).

Having considered all these facts, the Appellate Court on May 24, 1939 (R. 70), on petition, ordered that a writ of mandamus issue. In other words, the Court, after the lapse of one year and five months, issued mandamus to force compliance with its judgment.

Now, the Commission, through the Solicitor General, asks that this Court consider setting aside the order directing that mandamus issue, but at the same time, gives absolutely no reason why it should not comply with the Court's order of December 27, 1937.

THE QUESTION

The question now, and the sole question, is whether or not the Court below has power to issue a writ of mandamus to compel the Federal Communications Commission to comply with and carry out the Court's judgment of December 27, 1937.

Section 230, Page 70 of the Annotated Code of Laws for the District of Columbia, as amended to June 7, 1924, provides:

> "The said Court of Appeals shall have power to issue all necessary and proper remedial *prerogative* writs in aid of its appellate jurisdiction."

Section 402 (e) of the Communications Act of 1934, as amended and as quoted at Page 25 of the petition for certiorari in *Federal Communications Commission* vs. Pottsville

Broadcasting Company, in which a petition for certiorari was filed with this Court on August 5, 1939, No. 265, this term, specifically provides that the judgment of the United States Court of Appeals in these matters shall be final, subject only to review by this Court, as follows:

> "* * * The Court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under Section 240 of the Judicial Code, amended, by appellant, by the Commission, or by any interested party intervening in the appeal."

The judgment of December 27, 1937 here involved, has become final. In fact, no request has ever been made to modify, correct, enlarge or change that judgment in any way. The Court below, clearly therefore, has power to mandamus the Commission to act in accordance with that judgment as in aid of its appellate jurisdiction.

Mulvihill v. Clabaugh, 21 App. 440 (1903); 31 W.L.R. 210;

Slater v. Willige, 16 App. D.C. 364 (1900); 28 W.L.R. 454;

U. S. ex rel Beall v. Cox, 14 App. D. C. 368 (1899); 27 W.L.R. 231;

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Hartman v. Masters, 46 App. D.C. 271 (1917); 45 W.L.R. 246.

CONCLUSION

In view of the foregoing, respondent submits that the petition for certiorari should be denied.

PAUL R. HEITMEYER

BY .....

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September 1939.